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FEDERAL ELECTION COMMISSION

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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5512

DATE COMPLAINT FILED: August 11, 2004

DATE OF NOTIFICATION: August 18, 2004

LAST RESPONSE RECEIVED: August 3, 2005

DATE ACTIVATED: June 29, 2005

EXPIRATION OF STATUTE OF LIMITATIONS:
November 5, 2007

COMPLAINANT:

Alan Brown

RESPONDENTS:

Hastings for Congress and Thomas McIntosh, in his
official capacity as treasurer¹
Representative Alcee Hastings
Arthur Kennedy
Black Democratic Caucus of Broward County

RELEVANT STATUTES AND
REGULATIONS:

2 U.S.C. § 431(4)
2 U.S.C. § 431(8)(B)(ii)
2 U.S.C. § 433
2 U.S.C. § 434(b)(2)
2 U.S.C. § 434(b)(3)(A)

INTERNAL REPORTS CHECKED:

Federal Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The complaint in this matter alleges that Representative Alcee Hastings ("Hastings") and
Arthur Kennedy ("Kennedy"), Hastings' Congressional Chief of Staff, may have violated "the

¹ Commission records indicate the treasurer's name is Tomas Eduardo McIntosh, but correspondence from the Committee indicates his name is Thomas McIntosh.

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1 rules of the Federal Election Commission (FEC) and/or federal election laws, regulations, and
2 related Acts.” Based on the complaint, Hastings for Congress and Thomas McIntosh, in his
3 official capacity as treasurer (the “Committee”), and the Democratic Black Caucus of Broward
4 County (the “Caucus”) were also notified as respondents.²

5 The complaint contains six “counts.” Although each count contains a separate
6 allegation, counts 2, 4, 5 and 7 appear to be related and will be discussed together. As set forth
7 in more detail below, it appears the Committee failed to report contributions in violation of 2
8 U.S.C. § 434(b)(2) and may have failed to itemize contributions of more than \$200 in violation
9 of 2 U.S.C. § 434(b)(3)(A) in connection with a post office box it used, for which a third party
10 paid the rental fees. Accordingly, this Office recommends that the Commission find reason to
11 believe Hastings for Congress violated 2 U.S.C. §§ 434(b)(2) and (b)(3)(A), send an letter of
12 admonishment to the Committee that also requests it to amend its filings, and close the file as to
13 all the respondents.

14 II. DISCUSSION

15 A. Political Committee Allegation

16 1. Facts

17
18
19 The first count of the complaint alleges that “[a] political committee was formed and
20 received donations, made expenditures and never registered with the FEC as required.” It further
21 alleges that “[t]he committee also failed to file campaign donation or expenditure reports after

² Complainant noted that copies of the complaint had also been forwarded to the Federal Bureau of Investigation, the United States House of Representatives’ Committee on Standards and the Internal Revenue Service. Thus, to the extent any of his allegations concern activity outside of the Commission’s jurisdiction but possibly within the jurisdictions of those other organizations, they have been notified by the complainant. This Report discusses only allegations within the Commission’s jurisdiction.

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1 endorsing and distributing literature (Black Voter Guide) [sic] in support of the congressional
2 candidate." The count ends with "(See *Florida Election Commission/Broward State Attorney*
3 *complaint Composite exhibit 1*)." (Emphasis in original).

4 Exhibit 1 to the complaint contains a June 25, 2004 letter from Alan Brown (the
5 complainant in the instant MUR) to the Florida Elections Commission re "Black Voter Guide of
6 2002 [sic] Complaint," attaching Brown's "summary of alleged violations of Florida State
7 elections laws and rules" ("summary") and various exhibits. The summary names Hastings and
8 Kennedy as respondents; the other respondents are all state and local officials. According to the
9 summary, the respondents, who "at times referred to themselves as the 'Democratic Black
10 Caucus of Broward County,' an organization which didn't exist at the time and/or 'The Black
11 Elected Officials of Broward County,['] another organization that doesn't exist," solicited funds
12 "to produce what is termed, displayed, distributed and advertised as "*The Black Voter Guide*
13 [sic]." Allegedly, "the group reportedly collected an estimated \$45,000 to \$70,000 in
14 contributions" for this purpose. The summary states that the group never registered or filed with
15 the Commission, even though, it alleges, Hastings and Kennedy helped organize the group, and
16 the guide endorsed Hastings, as well as state and local candidates.³

17 In response, Hastings provided a copy of an affidavit that he says he submitted in
18 response to the complaint filed with the Florida Elections Commission; the affidavit, which is
19 unsigned, generally states as to each of the allegations that Hastings has "no knowledge and I

³ A copy of the Black Voter's Guide is included in Exhibit 1 to the complaint. The guide consists of two pages, mostly devoted to state and local candidates and ballot issues, which also appears to endorse "Alcee L. Hastings" for the office of "Representative in Congress" and contains a disclaimer stating "Pd. Pol. Adv. Paid for and approved by Congressman Alcee Hastings [and 26 other individuals, none of whom appear to be federal candidates]. Approved by all of the above listed candidates."

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1 deny," with two exceptions. Hastings more specifically states that he had no knowledge of and
2 did not offer any advice concerning the alleged group's registration status, and as to the
3 disclaimer, he states "[M]y name is listed as reflected, but I have no knowledge of the
4 preparation of the guide." Kennedy responded by stating that he "has no knowledge of or
5 involvement with the PAC referred to in Count 1." The Committee responded as follows: "The
6 Committee did not solicit or cause to be solicited any monies for production of a voter guide and
7 had no knowledge regarding this allegation or any other allegations alleged in the complaint."
8 The Caucus did not respond to the complaint.⁴

9 2. Analysis

10 We interpret count 1 of the complaint as alleging that in 2002, when Hastings was a
11 candidate for Congress, a group of persons solicited and raised contributions for the purpose of
12 preparing and distributing a "Black Voter's Guide" that, in addition to state and local candidates,
13 endorsed Hastings, and therefore should possibly have registered with the Commission as a
14 "political committee" pursuant to 2 U.S.C. § 433 and thereafter, filed disclosure reports in
15 accordance with 2 U.S.C. § 434. In order to be deemed a "political committee," a "committee,
16 club, association, or other group of persons" must have received contributions or made
17 expenditures aggregating in excess of \$1,000 during a calendar year." 2 U.S.C. § 431(4)(A).
18 Although the complainant alleges, without specifics, that a group "reportedly collected" an
19 estimated \$45,000 to \$70,000 to produce and distribute the Black Voter's Guide, other

⁴ In a telephone call, Andrew Lewis, president of the Caucus, stated that he would forward a response and documents showing the Caucus was "re-chartered" as a new organization on March 29, 2004, nearly two years after the Black Voter's Guide was produced. According to Lewis, the previous organization using the name of the group was defunct and the new organization is merely using the name of the defunct organization, but is otherwise not related to it. To date, this Office has not received anything in writing from the Caucus.

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1 information, including sworn statements by the author of the Black Voter's Guide obtained
2 during an investigation by the Florida Elections Commission, refutes complainant's allegation.

3 Earlier this year, the Florida Elections Commission issued an Order of No Probable
4 Cause ("Order") with respect to Brown's complaint against Hastings and dismissed the case. *See*
5 Attachment 1. The Order attaches a "Statement of Findings" submitted by the Florida Elections
6 Commission's General Counsel ("Statement"). The Statement reports that in a sworn affidavit,
7 state representative Chris Smith "acknowledged that he was solely responsible for creating,
8 designing and publishing the guide." Smith "further acknowledged he was solely responsible for
9 creating the wording of the political disclaimer," and "wanted the political disclaimer to reflect
10 the names of the people in the community who agreed with the guide's recommendations." In
11 addition, the Statement reports that in his affidavit, Smith "stated that he printed only 100 copies
12 of the guide on his home computer for his personal use for his friends and family [sic] and that he
13 also gave a copy of the guide to those people whose names were listed as having approved the
14 guide." According to the Statement, Smith averred that he personally distributed about 100
15 copies of the guide, and there was no cost for the printing of the copies as he did them on his
16 home computer.⁵ The Statement also reports that in a sworn response, Hastings denied any
17 knowledge concerning the preparation of the guide and denied any knowledge of and did not
18 offer any advice concerning the alleged group's registration status.

19

⁵ Although not included in the Statement, Smith's affidavit, a public document provided to us by the Florida Elections Commission, also states, "I have no knowledge of any person, or group, that requested or solicited money to pay for the printing and distribution of the guide," "I did not consult with anyone prior to creating and distributing the guide," and "I have no knowledge as to who was responsible for distributing any other copies of the guide." Attachment 2 at page 2; *see also* another Smith affidavit at Attachment 2 at page 4.

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Even though the Commission is not bound by the findings of the Florida Elections Commission and could conduct its own investigation into complainant's allegations, we recommend that it not do so because the Florida investigation obtained sworn evidence and addressed facts relevant to the MUR 5512 complaint filed with the Commission. Complainant's allegations in count 1 link the registration requirement solely to a group's alleged receipt of contributions and making of expenditures for the purpose of preparing and distributing the Black Voter's Guide. However, Smith's affidavit lays out facts sufficient to conclude that he, acting alone, prepared and distributed the guide at little or no cost. Accepting Smith's affidavit as true, there is no evidence that a group of individuals received any contributions or made any expenditures with respect to the Black Voter's Guide that would have brought them within the definition of a political committee required to register with and report to the Commission. Accordingly, we recommend that the Commission find no reason to believe that any violation of 2 U.S.C. § 433 or 2 U.S.C. § 434 occurred concerning the creation or distribution of, or the involvement of any group or person with, the Black Voter's Guide.

B. Allegations concerning failures to report the use of facilities and services

1. Facts

Count 2 of the complaint alleges that Hastings' Florida Congressional office and its resources were used "for reelection activity." Count 4 alleges that Kennedy, Hastings' Congressional Chief of Staff, allowed the Hastings campaign to use his home in Fort Lauderdale, Florida, "for reelection activity." Count 5 alleges that the Committee's main campaign phone line is installed in Kennedy's home, and has never been reported as a contribution. Count 7 states that the Committee "made numerous payments to BellSouth for phone and fax line service," and attaches at Exhibit 7 Schedules B filed by the Committee evidencing these

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1 payments. These payments, according to the complaint, "raise[] a question of whose phone bills
2 were paid and where were those phone lines actually installed" and calls for a review of
3 telephone company invoices.

4 Hastings' response acknowledges that telephone and facsimile lines were located at
5 Kennedy's residence and were used for campaign-related activity. Hastings' response further
6 states that these services were paid by the Committee as reported, and that all reported payments
7 made to BellSouth were, as far as could be determined, for campaign related phone service.
8 Kennedy asserts that his volunteering of his home to a political candidate is not a "contribution,"
9 within the meaning of the Commission's regulations, that the phone line referenced in count 5
10 was reported to the FEC and paid for with campaign funds, and that the payments reported to
11 BellSouth are "usual and ordinary."

12 2. Analysis

13 While the complaint does not explicitly state whether the telephone and facsimile lines
14 referenced in counts 5 and 7 are the same, it appears implicit in Hastings' and Kennedy's
15 responses that they are included within the BellSouth payments (the only telephone service
16 disbursements reported) and there is no evidence to indicate otherwise. If the Committee paid for
17 the telephone and facsimile lines in Kennedy's home as evidenced by the Committee's Schedules
18 B, then they were not in-kind contributions, and did not have to be reported as such pursuant to
19 2 U.S.C. § 434(b)(3)(A).

20 Regarding the allegation that the Committee failed to report the use of Kennedy's
21 residence as a donation, 2 U.S.C. § 431(8)(B)(ii) excludes the use of an individual's residential
22 property from the definition of "contribution." See 11 C.F.R. §§ 100.7(b)(4); 100.8(b)(5) (2000);
23 see also Federal Election Commission, *Campaign Guide for Congressional Candidates and*

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1 *Committees*, chapter 7 (2004). Therefore, any use of Kennedy's house by the Committee need
2 not have been reported as a contribution pursuant to 2 U.S.C. § 434(b)(3)(A). Accordingly, this
3 Office recommends that the Commission find no reason to believe that Hastings for Congress
4 and Thomas McIntosh, in his official capacity as treasurer, violated 2 U.S.C. § 434(b)(3)(A).

5 C. **Allegations of inaccurate reporting of tax payments**

6
7 1. **Facts**

8 Count 3 of the complaint raises an issue concerning the accurate reporting of tax
9 payments by the Committee. It states that the Committee reported interest earnings of \$3,478.07
10 on line 15 of its 2002 Post-Election Report for the entire election cycle, but also showed
11 payments of \$3,486.44 (\$585.53 to the Bank of America on March 25, 2001; \$800.91 to the IRS
12 on March 26, 2002; and \$2,100 to the IRS on December 28, 2002) for taxes on the interest
13 earned, amounting to 100% of the interest earned.

14 Hastings' response states that the Committee paid IRS taxes "pursuant to IRS law and
15 requirements." According to his response, the payments of \$585.53 and \$600.91⁶ (totaling
16 \$1,186.44) to Bank of America were due in connection with a campaign certificate of deposit,
17 and he attached as exhibits 2000 and 2001 1120-POL tax forms indicating that the Committee
18 owed these amounts of taxes on dividend earnings of \$1,772.94 (2000) and \$1,716.89 (2001), for
19 a total of \$3,489.85. Hastings further states that the payment of \$2,100 to the IRS in December
20 2002 was for "990-Pol organizations exempt from income tax. Penalty charges for Form 8868
21 extension denied," and attached two letters to the IRS dated August 26, 2002 and January 23,
22 2002 referencing a Form 8868 extension denial and a penalty payment, respectively, as evidence.

⁶ The complaint erroneously stated the payment was for \$800.91, but this appears to be due to the poor quality of the copy of the page from the disclosure records.

2. Analysis

Without knowing for certain when the Committee received its dividend payments, it appears that the \$3,478.07 reported on line 15 of the 2002 post-election report is not materially different from the \$3,489.85 in dividend earnings reported on the tax forms submitted with the response. Further, it appears that the \$1,186.44 income tax payments on those dividend earnings were reported in that amount. Finally, it appears that the \$2,100 reported as an "income tax payment" to the IRS related to a penalty payment, not a payment on investment earnings. Accordingly, this Office recommends that the Commission find no reason to believe that Hastings for Congress and Thomas McIntosh, in his official capacity as treasurer, violated 2 U.S.C. § 434(b)(2) or 2 U.S.C. 434 § (b)(4) in connection with its reporting of tax payments.

D. Allegations regarding failure to report in-kind contributions for the post office box rental

1. Facts

Finally, in count 6, the complainant alleges that "for decades" the Committee has not paid the rental fees for the Committee's post office box, Post Office Box 9352, Fort Lauderdale, Florida 33310, and has not reported the payments by someone else as contributions received by the Committee. He alleges that Hastings' and Kennedy's fraternity has also used the box.

Kennedy admits the allegation in his response and states that he was told by Hastings to obtain a post office box and pay for it with campaign funds, but that he "failed to follow instructions," a fact not known to Hastings until the complaint in MUR 5512 was filed. Kennedy's response did not explicitly indicate if he personally paid for the post office box or if a third party paid for it. Hastings stated in his response that the Committee has used the post office box, but "[u]ntil this complaint was filed I did not personally know that it was not paid for by the

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1 campaign," that "I did not know, but should have known the particulars regarding the post office
2 box," and that "I await appropriate instructions from the Commission."

3 2. Analysis

4 All contributions to an authorized committee, including in-kind contributions, are
5 required to be reported by the committee. 2 U.S.C. § 434(b)(2). Authorized committees are
6 required to report the identification of each person who makes a contribution, including an in-
7 kind contribution, with an aggregate amount or value in excess of \$200 per election cycle.
8 2 U.S.C. § 434(b)(3)(A). Both Kennedy and Hastings admitted that the Committee used the post
9 office box in question but did not pay the rental fees. Therefore, the Committee received, and
10 did not itemize or otherwise report, in-kind contributions in connection with those rental
11 payments.

12 According to the United States Postal Service website, current annual fees for a post
13 office box range from \$18 per annum to \$660 per annum, [http://pe.usps.gov/text/dmm/](http://pe.usps.gov/text/dmm/d910.htm)
14 [d910.htm](http://pe.usps.gov/text/dmm/d910.htm), and it is likely that those fees were originally lower but increased over time since
15 Hastings was first elected to Congress in 1992. Moreover, if the box was shared by another
16 party, as the complaint indicates, each party's share of the box may have been less than the full
17 charge.

18 Assuming that the full cost of the box ranged from a low of \$10 a year to a high of \$660 a
19 year, and each election cycle is two years, the box would have cost from \$20 to \$1,320 per
20 election cycle. Since any contribution to the cost of the post office box rental would require the
21 reporting of the contribution, and since the middle and high ends of the range may have required
22 the Committee to itemize receipt of an in-kind contribution over \$200, it appears that the
23 Committee may have violated the sections 434(b)(2) and 434(b)(3)(A) of the Act. Given the

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1 relatively low figures involved, however, it does not appear worthwhile for the Commission to
2 pursue the exact costs. The Committee is now aware of the problem and the notification letter
3 will request the Committee to amend its filings for the immediate past and present election cycles
4 to disclose the in-kind contributions received in connection with the rental of its post office box,
5 and itemize them if they were over \$200, as well as remind it of the obligation to appropriately
6 report all in-kind contributions in the future. For these reasons, this Office recommends the
7 Commission find reason to believe that Hastings for Congress and Thomas McIntosh, in his
8 official capacity as treasurer, violated 2 U.S.C. § 434(b)(2) by failing to report and 2 U.S.C.
9 § (b)(3)(A) by failing to itemize payment of the post office box rental fees as contributions, take
10 no further action, and issue a letter of admonishment.

11 This Office also recommends that the Commission close the file as to all respondents.

12 **III. RECOMMENDATIONS**

- 13 1. Find reason to believe that Hastings for Congress and Thomas McIntosh, in his
14 official capacity as treasurer, violated 2 U.S.C. § 434(b)(2) by failing to report and
15 2 U.S.C. § (b)(3)(A) by failing to itemize payment of the post office box rental
16 fees as in-kind contributions, take no further action, and send an admonishment
17 letter.
- 18 2. Find no reason to believe that any violation of 2 U.S.C. § 433 or 2 U.S.C. § 434
19 occurred concerning the creation or distribution of, or the involvement of any
20 group or person with, the Black Voter's Guide.
- 21 3. Find no reason to believe that Hastings for Congress and Thomas McIntosh, in his
22 official capacity as treasurer, violated 2 U.S.C. § 434(b)(3)(A) by failing to report
23 of the use of a residence, or payments for telephone and facsimile lines.
- 24 4. Find no reason to believe that Hastings for Congress and Thomas McIntosh, in his
25 official capacity as treasurer, violated 2 U.S.C. § 434(b)(2) or 2 U.S.C.
26 § 434(b)(4) in connection with its reporting of tax payments.
- 27 5. Approve the appropriate letters.

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6. Close the file as to all the respondents.

Lawrence H. Norton
General Counsel

Rhonda J. Vosdingh
Associate General Counsel
for Enforcement

October 19, 2005
Date

BY: Susan L. Lebeaux
Susan L. Lebeaux
Assistant General Counsel

J. Cameron Thurber
J. Cameron Thurber
Attorney

Attachments:

1. Florida Elections Commission Order of No Probable Cause
2. Affidavits of Christopher L. Smith

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